Supreme Court, U.S.
FILED
DEC 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-632

In The

Supreme Court of the United States

October Term, 1988

CONSOLIDATED CAPITAL CORPORATION,
a Florida corporation,
SKYWAY DEVELOPMENT CORPORATION,
a Florida corporation
and MURRAY WEISS,

Petitioners,

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY;
CAREY, DWYER, COLE, ECKHART, MASON & SPRING,
P.A.; LELAND E. STANSELL, JR.;
JOHN H. LEWIS; and MARK A. KAMILAR,

Respondents.

BRIEF FOR RESPONDENT, CONROY, SIMBERG & WILENSKY AND RESPONDENT, JOHN H. LEWIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY T. WIHNYK, ESQUIRE
Counsel of Record

CONROY, SIMBERG & LEWIS, P.A.
2620 Hollywood Boulevard
Hollywood, Florida 33020
(305) 921-1101 (Broward)
(305) 940-4821 (Dade)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PREFACE 1

STATEMENT OF CASE 1

ARGUMENT 1

I. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE CONSTITUTIONAL ISSUE PRESENTED BECAUSE THERE IS NO STATE COURT FINAL JUDGEMENT THAT DRAWS IN QUESTION THE VALIDITY OF THE PROVISION OF THE FLORIDA CONSTITUTION ATTACKED BY PETITIONERS 1

II. THE PETITIONERS FAIL TO DEMONSTRATE ANY VIOLATION OF THEIR CONSTITUTIONAL RIGHTS 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Bankers Life and Casualty Co.v. Crenshaw, 108 S.Ct. 1645 (1988) 2

Douglas v. California, 372 U.S. 353 (1963) 5

Ross v. Moffitt, 417 U.S. 600 (1974) 5

Tierney v. Tierney, 290 So.2d 136 (Fla. 2d DCA 1974) 3

Webb v. Webb, 101 S.Ct. 1889,1894 (1981) 2

Williams v. Wainwright, 452 F.2d 775 (5th Cir. 1971) 4

CONSTITUTIONS

U.S. Const. amend. XIV 1, 5

Fla. Const. Article V, Section 3 ..... 2, 3, 4

Fla. Const. Article V, Section 3(b)(3) 1

STATUTES

28 U.S.C. Section 1257 ..... 2, 3

PREFACE

All references to the appendices to the Petition for Writ of Certiorari will appear as follows:

(A. ___)

STATEMENT OF CASE

Respondent, CONROY, SIMBERG & WILENSKY, and Respondent, JOHN H. LEWIS, adopt and join in Respondent, SHEA & GOULD'S, Statement of the Case.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE CONSTITUTIONAL ISSUE PRESENTED BECAUSE THERE IS NO STATE COURT FINAL JUDGEMENT THAT DRAWS IN QUESTION THE VALIDITY OF THE PROVISION OF THE FLORIDA CONSTITUTION ATTACKED BY PETITIONERS

Respondent, CONROY, SIMBERG & WILENSKY, and Respondent, JOHN H. LEWIS, join in the argument raised by Respondent, SHEA & GOULD, to the effect that this Court does not have jurisdiction to consider the constitutional issue presented by Petitioners because there is no state court final judgement that draws in question the validity of Article V, Section 3(b)(3), of the Florida Constitution under the Fourteenth Amendment to the United States Constitution. Consequently, Respondents adopt

that argument herein and urge that the Petition be denied.

The obvious and paramount reason that there is no state court final judgement that raises, considers or passes on the constitutional question raised in the Petition is that the validity of Article V, Section 3(b)(3), of the Florida Constitution was not raised as an issue in the appeal to the District Court of Appeal of Florida, Second District. Petitioners never discussed the issue until they mentioned it in the various Motions to Stay Issuance of Mandate. (A. 19a, 31a). However, this is not a sufficient raising of the federal question to invoke this Court's jurisdiction here.

In order to invoke the jurisdiction of the Supreme Court of the United States under 28 U.S.C. Section 1257, the Petitioner must have afforded the state court a fair opportunity to address the federal question that is sought to be presented to this Court.

> At the minimum . . . there should be no doubt from the record that a [federal] claim . . . was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and *in the manner required by the state law.* (emphasis added).

Webb v. Webb, 101 S.Ct. 1889,1894 (1981); *Bankers Life and Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988).

Although Petitioners maintain that they raised the federal question properly, a review of the record demonstrates the contrary. Mentioning the constitutional issues relating to Article V, Section 3, (issues totally unrelated to the issues argued to the appellate court on the merits) in various motions seeking a stay of the mandate is not the

manner for mounting a constitutional challenge of a provision of the Florida Constitution in the courts of Florida.

A motion pursuant to Rule 9.310 of the Florida Rules of Appellate Procedure merely seeks a stay pending review in another court. A mandate is the official mode of the appellate court of communicating its judgement to the lower court, directing the action to be taken or the disposition to be made of the cause. *Tierney v. Tierney*, 290 So.2d 136 (Fla. 2d DCA 1974). In this case the Petitioners were employing Rule 9.310 merely to stay issuance of the document that would have made final the appellate court's decision to affirm the judgment of the trial court enforcing attorneys' charging liens. (A. 3a). Certainly such a motion in the appellate or Supreme Court of Florida does not afford those courts a fair or proper opportunity to consider federal constitutional challenges directed to issues completely unrelated to the issues passed on by the trial and appellate courts. Hence, it defies logic for Petitioners to maintain that the courts could have considered and resolved their federal constitutional challenge to Florida's appellate system in motions directed to the ministerial act of finalizing the judgment enforcing charging liens.

There is no state court judgement that draws in question the validity of Article V, Section 3, of the Florida Constitution. Moreover, the Florida courts were not given a fair opportunity to consider the federal questions improperly raised by Petitioners. Therefore, this Court has neither appellate nor certiorari jurisdiction under Section 1257.

II.

THE PETITIONERS FAIL TO DEMONSTRATE ANY VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

Respondents maintain that this Court does not have jurisdiction over the Petition. However, even if there were jurisdiction, the Petition should be denied because Petitioners have failed to demonstrate that there is a violation of their constitutional rights. Petitioners' attacks against Article V, Section 3, of the Florida Constitution are without merit. Therefore, the Petition should be denied.

Petitioners argue that Article V, Section 3, of the Florida Constitution violates equal protection and due process because, under the circumstances in this case, Petitioners were forestalled from review in the Supreme Court of Florida. The rationale behind this argument is that once a state creates appellate courts, appeals must be decided according to a procedure that comports with due process and equal protection. Petitioners contend that their appeal was not decided according to a constitutionally valid process. This argument is based on the assumption that there must be an unrestricted right to access to review in the Florida Supreme Court. However, Petitioners fail to recognize that under the appellate court system of Florida the District Courts of Appeal were not created as intermediate courts "but as the 'end of the road' for most appeals." *Williams v. Wainwright*, 452 F.2d 775 (5th Cir. 1971). Just as with this Court there is no unrestricted right to appeal or access by way of petition to the Florida Supreme Court.

The fundamental fallacy with Petitioners' position is that it places the failure to obtain review in the Florida Supreme Court on a par with the denial of the right to an appeal. This is underscored by the fact that Petitioners rely on authorities such as *Douglas v. California*, 372 U.S. 353 (1963), to support their position. However, these authorities involve situations where litigants are barred for one reason or another from their one appeal as of right.

In *Douglas*, this Court held that the Fourteenth Amendment is violated where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel in a criminal case. However, in *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court refused to extend that holding to situations involving discretionary state appeals or applications for review in this Court, the rationale partially being that the litigant's claims had once been presented by legal counsel and passed on by an appellate court. *Ross*, at 614. Clearly, constitutional safeguards that apply to an appeal as of right do not extend to later discretionary review. Moreover, no case is cited to support any constitutional requirement for discretionary review.

The record is clear that Petitioners received their appeal as of right in the Second District Court of Appeals and, thus, were provided the opportunity to fully litigate their cause up to the appellate court provided by Florida law as the final arbiter as of right in this case. Petitioners have failed to provide any support, however, that their right to appeal was denied because they were forestalled from obtaining discretionary review in the Florida Supreme Court. Consequently, Petitioners have failed to

demonstrate that their constitutional rights have been violated.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HENRY T. WIHNYK, ESQUIRE
2620 Hollywood Boulevard
Hollywood, Florida 33020
(305) 921-1101 (Broward)
(305) 940-4821 (Dade)